

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JAMES ANTHONY DAVIS,

Plaintiff,

v.

HIGH DESERT STATE PRISON, *et al.*,

Defendants.

2:07-cv-01174-JCM-LRL

O R D E R and RECOMMENDATION

In its October 16, 2008 Order (#9), the court instructed the Office of the Attorney General of the State of Nevada to advise whether they could accept service of process for the defendants named in plaintiff's Complaint. *See* Pet. (#1). The Attorney General timely filed a Notice (#10) on October 29, 2008, informing the court that service could not be accepted for defendants High Desert State Prison ("HDSP"), Correctional Officer Williams, Lieutenant Powe, Lieutenant Gunn, Mr. Promer, or "Laundry Staff." Citing NRS 41.031(2), the Attorney General states that HDSP is "the wrong entity to file suit against and therefore must be properly named and served." Notice (#10) at 1. The other defendants are either no longer employees with the Nevada Department of Corrections ("NDOC"); cannot be located as being employed by the NDOC; or do not have a first name listed and cannot be identified among numerous current and former employees with the same last name. *Id.*

Plaintiff will be given an opportunity to file a motion specifying the full names and addresses of defendants Correctional Officer Williams, Lieutenant Powe, Lieutenant Gunn, Mr. Promer, and "Laundry Staff"; and requesting issuance of summons for these unserved defendants. However, the court recommends that HDSP be dismissed from the action.

HDSP is an institution within the NDOC, a department of the State of Nevada. A state agency

1 is not a “person” subject to suit under § 1983. *Arizonans for Official English v. Arizona*, 520 U.S. 43,
2 68-69 (1997); *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65-66, 71 (1989); *Hale v. Arizona*, 993
3 F.2d 1387, 1398 (9th Cir. 1993) (en banc). Further, the Eleventh Amendment bars § 1983 suits against
4 states and their agencies. *Hyland v. Wonder*, 117 F.3d 405, 413 (9th Cir. 1997), *amended by* 127 F.3d
5 1135 (9th Cir. 1997); *Lucas v. Dep’t of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995). The NDOC is
6 state-controlled and funded, and therefore is considered part of the State shielded by Eleventh
7 Amendment immunity. *See Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 494 n.3 (10th Cir.
8 1998) (discussing factors for determining whether an entity is an arm of the state for Eleventh
9 Amendment purposes). The State has not waived its immunity from suit conferred by the Eleventh
10 Amendment. NRS 41.031(3). As such, HDSP should be dismissed from the action.

11 Accordingly, and for good cause shown,

12 IT IS ORDERED that plaintiff shall, not later than December 12, 2008, file a motion specifying
13 the full names and addresses of defendants Correctional Officer Williams, Lieutenant Powe, Lieutenant
14 Gunn, Mr. Promer, and “Laundry Staff”; and requesting issuance of summons for these unserved
15 defendants.

16 IT IS ALSO RECOMMENDED that defendant High Desert State Prison be dismissed with
17 prejudice.

18 DATED this 13th day of November, 2008.

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21 **LAWRENCE R. LEAVITT**
22 **UNITED STATES MAGISTRATE JUDGE**
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